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IN THE

Supreme Court of the United States

October Term, 1959.

No. 379

LEHIGH CASINO, INC.,

Appellant,

v.

PENNSYLVANIA LIQUOR CONTROL BOARD

and

COMMONWEALTH OF PENNSYLVANIA.

Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

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APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION.

Appellant, pursuant to United States Supreme Court Rules 13 (2) and 15, files this its statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the order of the Supreme Court of Pennsylvania, affirming the order of the Superior Court of Pennsylvania, in turn, affirming the order of the Court of Quarter Sessions for the County of Philadelphia, upholding a decision of the Pennsylvania Liquor Control Board which suspended appellant's restaurant liquor license and amusement permit upon the ground of alleged violation of the Pennsylvania Liquor Code and Regulation 110.02D issued pursuant thereto.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania, filed March 25, 1959, is reported at 395 Pa. 355, 150 A. 2d 112, and is printed in the appendix hereto. The opinion of the Superior Court of Pennsylvania, filed June 11, 1958, is found at 186 Pa. Superior Ct. 223, 142 A. 2d 495, and is printed in the appendix hereto. The opinions of the Court of Quarter Sessions for the County of Philadelphia, filed July 26, 1957 and November 14, 1957 are not reported, but are printed in the appendix hereto.

JURISDICTION.

This appeal is from an order of the Supreme Court of Pensylvania upholding the constitutionality of certain portions of the Pennsylvania Liquor Code and Regulation 110.02D issued pursuant thereto, and affirming the order of the Superior Court of Pennsylvania (and, in effect, of the Court of Quarter Sessions for Philadelphia County) which affirmed the order of the Pennsylvania Liquor Control Board suspending the appellant's restaurant liquor license and amusement permit. The Supreme Court of Pennsylvania issued its order on March 25, 1959. Notice of appeal to this Court was filed with the Supreme Court of Pennsylvania on May 8, 1959. An extension of time for docketing the appeal in this Court until September 6, 1959, was granted by the Supreme Court of Pennsylvania on July 1, 1959.

The provisions of 28 U. S. C. Section 1257 (2) confer jurisdiction upon this Court to review an appeal from said final judgment of the Supreme Court of Pennsylvania. The following cases are believed to sustain the jurisdiction of this Court: *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; *Superior Films, Inc. v. Department of Education*, 346

U. S. 587; *Roth v. United States*, 354 U. S. 476; *Kingsley Books, Inc., v. Brown*, 354 U. S. 436; *Kingsley International Pictures Corp. v. Regents, etc.*, — U. S. —, 79 S. Ct. 1362.

There is involved herein the constitutionality of the Pennsylvania Liquor Code, Act of April 12, 1951, P. L. 90, 47 Purdon's Statutes, Sec. 1-101 et seq. Article IV thereof (47 Purdon's Statutes, Sec. 4-493) provides in pertinent part that it shall be unlawful:

> (10) For any licensee, his servants, agents or employes, except club licensees, to permit in any licensed premises or in any place operated in connection therewith, dancing, theatricals or floor shows of any sort, or moving pictures other than television, or such as are exhibited through machines operated by patrons by the deposit of coins, which project pictures on a screen not exceeding in size twenty-four by thirty inches and which forms part of the machine, unless the licensee shall first have obtained from the board a special permit to provide such entertainment, or for any licensee, under any circumstances, to permit in any licensed premises any lewd, immoral or improper entertainment, regardless of whether a permit to provide entertainment has been obtained or not. The board shall have power to provide for the issue of such special permits, and to collect a fee for such permits equal to one-fifth of the annual license fee but not less than twenty-five dollars ($25). All such fees shall be paid into the State Stores Fund. No such permit shall be issued in any municipality which, by ordinance, prohibits amusements in licensed places. Any violation of this clause shall, in addition to the penalty herein provided, subject the licensee to suspension or revocation of his permit and his license.

Section 494 of the Pennsylvania Liquor Code (47 Purdon's Statutes, Sec. 4-494) provides for penalties for violation of Article IV:

(a) Any person who shall violate any of the provisions of this article, except as otherwise specifically provided, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars ($100), nor more than five hundred dollars ($500), and on failure to pay such fine, to imprisonment for not less than one month, nor more than three months, and for any subsequent offense, shall be sentenced to pay a fine not less than three hundred dollars ($300), nor more than five hundred dollars ($500), and to undergo imprisonment for a period not less than three months, nor more than one year.

(b) The right of the board to suspend and revoke licenses granted under this article shall be in addition to the penalty set forth in this section.

Also involved herein is Section 110.02D of the Regulation promulgated by the Pennsylvania Liquor Control Board, which provides in pertinent part:

No licensee shall require, request or permit any person engaged directly or indirectly as an entertainer in the licensed establishment or in any room or place connected therewith, to contact or associate with the patrons in such establishments, room or place for any purpose whatsoever * * *

The Supreme Court of Pennsylvania upheld the constitutionality of Section 4-493 (10) of the Pennsylvania Liquor Code, as well as Regulation 110.02D.

QUESTIONS PRESENTED.

Section 493 of Article IV of the Pennsylvania Liquor Code authorizes criminal penalties and revocation or suspension of the licenses of licensees who permit "lewd, or immoral or improper" entertainment upon the licensed premises. Regulation 110.02D of the Pennsylvania Liquor Control Board forbids any licensee to permit entertainers in any licensed establishment "to contact or associate with the patrons * * * for any purpose whatsoever". The questions presented by this appeal are:

(1) Whether Section 493 of Article IV of the Pennsylvania Liquor Code is violative of the guarantees of freedom of expression and due process of the Fourteenth Amendment.

(2) Whether the Commonwealth of Pennsylvania in exercise of its right to regulate the dispensing of alcoholic beverages, Constitutionally has the power to prohibit expression, when such prohibition would, otherwise, be violative of the Fourteenth Amendment.

(3) Whether the entertainment in question is "obscene" under a Constitutional definition of obscenity.

(4) Whether Section 493 of the Pennsylvania Liquor Code is further violative of the Fourteenth Amendment in that it fails to provide for trial by jury of the issue of "obscenity".

(5) Whether Regulation 110.02D of the Pennsylvania Liquor Control Board also is violative of the Fourteenth Amendment's guarantee of freedom of expression.

STATEMENT OF THE CASE.

Appellant operates in the City of Philadelphia an establishment licensed under the Pennsylvania Liquor Code. On December 19, 1956 the Pennsylvania Liquor Control Board (hereinafter called "Board") issued a suspension of appellant's license and amusement permit for a period of sixty days. This suspension was based upon the Board finding that appellant had permitted "lewd, immoral and-or improper entertainment on the licensed premises on May 24 and 26, 1956", and that appellant permitted "entertainers to contact and or associate with patrons on the licensed premises, on May 24, 1956".

The evidence before the Board was stipulated as evidence als. before the Court of Quarter Sessions for Philadelphia County in the appeal to that Court from the Board's order of suspension. In addition thereto, appellant introduced further evidence. The testimony of the enforcement officers of the Board indicates that they investigated appellant's premises on May 24 and May 26, 1956, from 10:30 to 11:20 P. M. There were 65 patrons present and they observed female dancers doing "bumps and grinds" or "moving the lower part of their bodies backward and forward in both a fast and slow motion". No performance terminated with the nudity of the breasts or lower abdominal region of any of the dancers, but in each instance they finally appeared in abbreviated dancing costumes. An officer of the appellant testified that he employed the dancers through authorized, legitimate booking agencies and that they were all members of AGVA (American Guild of Variety Artists). He testified that the acts were known as "character" or "exotic" dancers. Similar acts were observed in other licensed premises throughout the City of Philadelphia by the Board's officers.

The Court of Quarter Sessions for Philadelphia County dismissed appellant's appeal from the Board's order of sus-

pension, and affirmed said order. In doing so, the Court conceded that two of the three descriptions of prohibited types of entertainment are invalid, stating that "what is 'immoral' is often a question of locale, taste, and individual upbringing of those who sit in judgment. The same can be said of the word 'improper'. What one person regards as improper, another would consider tame, altogether dull, and of unquestionable propriety." (Appendix 1a-2a.)

The Superior Court of Pennsylvania in its opinion noted that appellant contended (1) that the language of Section 493 of the Pennsylvania Liquor Code is unconstitutionally vague, (2) that the entertainment was not obscene, and (3) that appellant was entitled to a jury trial. It held against appellant on all of these contentions and, in addition, the Superior Court held that the Board's Regulation 110.02D was valid.

The Supreme Court of Pennsylvania, in response to the appellant's petition raising substantially questions 1, 3[5] presented herein,* granted an allocatur, allowing an appeal to it from the order of the Superior Court of Pennsylvania, "because of the important constitutional issues raised by appellants" (Appendix, 1a). The Supreme Court's opinion states as the significant and determinative question in the case:

> * * * whether or not a state in *its regulation and privilege of dispensing alcoholic beverages* may condition that privilege by prohibiting types of conduct and action that in another setting might be constitutionally protected. * * * (Appendix, 1a.)

The Supreme Court of Pennsylvania further stated the rationale of its decision as follows:

> * * * "Our present inquiry is directed toward determining whether or not a state in exercising this power

* See page 5, *supra*.

is limited and restricted by the constitutional guarantee to each individual of his right to freedom of speech and expression.

In view of the historical background giving the state virtually an absolute control over the business of dispensing alcoholic beverages, the mere statement of the question compels a negative reply (Appendix, 1a.)

The Supreme Court of Pennsylvania further stated in its opinion:

Nor are we any more receptive to appellants' contentions that the terms "lewd, immoral and or improper" are so vague and indefinite as to permit punishment for incidents falling fairly within the protection of free speech in contravention of the *due process* clause of the Fourteenth Amendment. The privilege of selling alcoholic beverages conditioned upon the presentation of a certain quality of entertainment in establishments where the privilege is exercised is not, as we have determined, an incident falling fairly within the protection of free speech. For this reason, appellants' assumption that a state, in conditioning the issuance of a liquor license, may only prohibit entertainment in a licensed establishment that comes within the term "obscenity" as delineated by the United States Supreme Court in interpreting the state's limitations under the First and Fourteenth Amendments is unwarranted. If a state may prohibit *all* entertainment in an establishment where liquor is sold without violating the First and Fourteenth Amendments, it may fairly prohibit entertainment which may not necessarily be considered obscene, without violating these same amendments (Appendix 1a).

The Supreme Court of Pennsylvania while recognizing that statutes restricting freedom of expression must be

definite, held that the instant case did not involve that type of statute (Appendix 1a). It further held that viewing the statutory terms "lewd, immoral or improper" unfettered by the confining interpretive requirements applied to statutes specifically restricting freedom of expression, the terms were not too vague to conform to the due process requirements of the Fourteenth Amendment (Appendix 1a). The Supreme Court of Pennsylvania affirmed the finding below that the entertainment in question violated Section 493 in that it was "lewd, immoral and/or improper". It noted that both the trial court and the Superior Court of Pennsylvania, equating the terms "lewd and immoral" with "obscene", found that the entertainment "was a predominant appeal to prurient interests" (Appendix 1a). As to Regulation 110.02D, the Supreme Court of Pennsylvania held that:

> * * * The grant of the privilege to dispense alcoholic beverages upon the condition that certain acts and conduct on the part of the employees or entertainers be prohibited while on the licensed premises *is outside the orbit of the constitutional provisions which assure to individuals the right to freedom of speech and expression.* (Appendix, 1a) (Emphasis supplied.)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

The appellant, Lehigh Casino, Inc., adopts this section of the Jurisdictional Statement filed by appellant Tahiti Bar, Inc., and respectively refers the Court to pages 10 through 15 of the Tahiti Bar, Inc., Jurisdictional Statement.

CONCLUSION.

The Pennsylvania Statute is void on its face. We submit that this Court may summarily reverse upon this ground alone.

If the Court does not agree with this submission, then we urge that the instant appeal is certainly an appropriate one for decision after full argument, upon the following grounds: The instant appeal raises important questions in the area of Constitutional protection of freedom of expression, as well as in the area of the relationship between the police power of a state and Constitutionally protected liberties, where the dispensing of liquor is involved. It raises, further, the effect of the decision in *Roth v. United States* on expression which is not obscene. It raises, finally, the issue of whether the determination of expression as obscenity must Constitutionally be made only by the final arbiter of community standards,—the jury.

Respectfully submitted,

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Appendix.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Please refer to pages (1a) through (15a) of appellant Tahiti Bar, Inc.'s Jurisdictional Statement.

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA.

Opinion by Ervin, *J.*

The facts and law involved in this appeal are the same as those which were involved in the *Matter of Tahiti Bar, Incorporated*, No. 268, October Term, 1957. Our decision in the *Tahiti Bar* matter controls this case.

The order is affirmed.

OPINION OF THE COURT OF QUARTER SESSIONS FOR PHILADELPHIA COUNTY.

Lewis, *P. J.*, July 26, 1957.

Ignoring for the time being the charge that the licensees did not conduct bona fide restaurants, we conclude that the credible testimony supports the charge that the licensees permitted so-called entertainment or acts by female performers that were undoubtedly lewd as that term is defined under the Common law. What is "immoral" is often a question of locale, taste, and individual upbringing of those who sit in judgment. The same can be said of the word "improper". What one person regards as improper,

another would consider tame, altogether dull, and of unquestionable propriety. It is the public exhibition of lewdness that persuades us to affirm the finding and order of the Pennsylvania Liquor Control Board, which we now do with this qualification:

The present governor being a man of refinement and high character, has, as we are advised, frowned upon the type of entertainment existing in taprooms prior to his taking office and has brought about the promulgation of new regulations by the Liquor Control Board, of which we thoroughly approve. Our only objection is that notice was not given to the licensees of this change of policy, in advance of prosecution, in order that they and their competitors might all have been required to conform to the salatary "clean-up" of places of public entertainment.

The evidence offered before us in these cases, all heard on the same day, makes clear that the offenses charged against these licensees resulted from certain performances of so-called "strip-tease" entertainers that had been exhibited rather generally in Philadelphia taprooms for many years in one case the licensee testified that the time was at least five years. During this period, the fact that the licensees were staging such entertainment was undoubtedly known to the members of the Liquor Control Board, and they either authorized or tolerated the exhibitions by tavern keepers, who are engaged in a highly competitive enterprise among whom it is undoubtedly customary to endeavor to meet competition by offering the same kind of entertainment that has been found successful by competitors. To give the advance notice referred to is only fair play. It is conceded that no such notice was given, and because of this, we urge the members of the Board to accept from these licensees a penalty in the nature of a compromise, such as a fine, instead of closing the premises for a fixed period.

It is to be noted that as to the licensee operating under the name of "Spider Kelly", this is the first offense and hence, we conclude that a reduction of the period of suspension to five days is in order.

ORDER.

Accordingly, now, July 26, 1957, the Appeals are dismissed and the orders of the Liquor Control Board are affirmed, except as to the case of the licensee known as Spider Kelley. The period of suspension is reduced to five days. The Liquor Control Board, may, in its discretion, as provided by statute, accept the suggested compromises as a penalty in lieu of such suspension, as if such an order had been granted by the Board originally.

By THE COURT:

LEWIS,
P. J.

FINDINGS AND ORDER OF THE COURT OF QUARTER SESSIONS FOR PHILADELPHIA COUNTY.

November 14, 1957.

LEWIS, *P. J.*

When this matter was originally before us we concluded after hearing that the credible evidence sustained the charge that the licensee had permitted lewd, immoral and improper entertainment on the licensed premises, and accordingly affirmed the findings and order of the Pennsylvania Liquor Control Board.

In a memorandum filed July 24, 1957, we suggested that the Board accept from the licensee a penalty in the nature of a compromise, such as a fine, instead of closing the premises for a fixed period. The licensee, as in the companion cases, then filed a petition for a rehearing, alleging, inter alia, that our order of compromise was contingent upon the Board accepting the compromise in lieu of suspension, which the Board had refused. In addition, the petition for rehearing complained of our failure to pass upon the propriety of the finding of the Liquor Control Board that the licensee by its servants, agents or employees permitted entertainers to contact or associate with patrons on the licensed premises.

It should first be noted that our order of compromise of the Liquor Control Board was in no way contingent upon the Board accepting a compromise in lieu of suspension. It is doubtless a fact that the suspension imposed by the Liquor Control Board was induced chiefly by the finding that the licensee permitted indecent entertainment on the premises, and hence no finding was made by us as to the legal sufficiency of the other charges.

We have now granted a rehearing for the sole purpose of receiving evidence bearing upon the charge that the licensee permitted entertainers to contact and associate with patrons on the licensed premises.

The evidence adduced at the hearing before the Liquor Control Board established that the two agents of the Board observed two of licensee's entertainers seated at the bar of the establishment conversing with patrons on July 24, 1956, and that on July 26, 1956, all four female entertainers were observed with patrons in the licensee's establishment. It was also pointed out that one of the female entertainers conversed and associated with more than one male patron. The licensee has now offered testimony tending to establish that it forbade its entertainers to associate with the patrons, and that, in addition, their union contract of employment likewise prohibited contact or association with patrons. In addition, it appears that it is the practice for the agents of the entertainers to visit their places of employment in order to observe their clients' performances and to collect union dues and fees; also that female entertainers are often visited at their place of employment by their respective husbands and friends. However, no evidence was offered tending to establish that the persons with whom the entertainers associated on the dates in question were other than ordinary male patrons in the establishment.

Pennsylvania Liquor Control Board Regulation 110, subsection D, provides:

> "D. No licensee shall require, request or permit any person engaged directly or indirectly as an entertainer in the licensed establishment or in any room or place connected therewith, to contact or associate with the patrons in such establishment, room or place for any purpose whatsoever."

The purpose of this regulation is to prevent any contact or association between entertainers and the patrons of the licensed establishment. At first reading such a regulation might seem unduly harsh. However, when it is considered that in this case the female entertainers a short time before joining the patrons had engaged in a lewd and

indecent performance calculated to arouse the lustful desires of the same patrons, the reasonableness of the regulation is apparent.

It is one thing to stage a performance on a platform isolated from the audience. It is quite a different thing to stage the same performance in the midst of an audience and then to permit the entertainers to freely mingle with patrons whose usual sense of propriety may be dulled by the consumption of intoxicating liquor.

The weight of the evidence is undoubtedly against the licensee. Accordingly, the finding and order of the Liquor Control Board are affirmed, and the appeal is dismissed. The period of suspension shall begin on November 22, 1957.

By THE COURT:

EDWIN O. LEWIS,
P. J.

FINAL ORDER.

Nov. 14, 1957. The finding and order of the Liquor Control Board are affirmed, and the appeal dismissed. The period of suspension shall begin on November 27, 1957.